

From: [Benjamin Davenport](#)
To: [Rule Making](#); [Amy Johnson](#); [Mick Thomas](#); [Eric Wilson](#)
Subject: IMA comments of 20.0302.1901
Date: Friday, July 24, 2020 2:26:15 PM
Attachments: [IMA Comments to 20.0302.2001 Draft rule 8.pdf](#)

Please see attached.
Have a good weekend.
Ben

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July 24, 2020

Idaho Department of Lands
Attn: Amy Johnson - Rulemaking
300 N. 6th St., Suite 103
Boise, ID 83702

Re: Rulemaking for IDAPA 20.03.02
Docket No. 20-0302-2001
Draft Rule No. 8 dated July 16th, 2020

Dear Ms. Johnson:

The Idaho Mining Association (IMA) appreciates the opportunity to provide the following general and specific comments to the subject Rule Draft No. 8.

GENERAL COMMENTS:

IMA appreciates IDL's efforts over the past two months to work with stakeholders on creating a workable rule for industry and the State of Idaho. Draft #8 has taken positive steps toward a rule that reflects best practices in the industry as well as what is appropriate and necessary to provide adequate financial assurances to the State for mining projects. IMA believes it is important to keep in mind the statutory changes that were made in HB141 while we work towards a proposed rule. The changes in HB141 were to provide a financial assurance mechanism that was modern, protective and achievable. Because of the nature of our regulatory structure, it will be imperative for IDL to enter into memorandums of agreements (MOAs) with other agencies to facilitate the sharing of information needed to calculate adequate financial assurances on a given project. Further, it is still our belief that allowing the option to use industry recognized standardized cost estimator tools many of the questions that still seem to remain with some in the department will be resolved. There are a few remaining issues that we believe need to be addressed as set forth below, but IMA is hopeful that these remaining issues can be negotiated and resolved within the timeframe outlined at our last rulemaking.

SPECIFIC COMMENTS:

IDL Proposed: IDAPA 20.03.02.070.05.d, h Operating plan requirements.

IMA's concern. Idaho Code § 47-1506 requires an operating plan to be included in a reclamation plan if an operator has not already submitted an operating plan to an entity of the federal government. IMA believes subsection 070.05 needs to reflect the statutory language that an operator that is required to submit an operating plan to an entity of the federal government shall not be required to submit an operating plan to IDL.

Specific to the requirements outlined in IDLs non-federal operating plan, requirement (d), IMA believes IDL requesting water discharge points during operations is out of the departments regulatory scope. Further, these discharge points will be identified and included in an IPDES permit. IMA Suggests deleting this requirement.

Requirement (h) requests that information regarding processing fluid ponds be included. If this is in reference to cyanide facilities, we suggest clarifying language as the requirement would not be applicable to all types of operations.

IDL Proposed: IDAPA 20.03.02.070.06. Monitoring Data.

IMA now understands that this section is intended to help facilitate interagency coordination with IDEQ. We support this coordination and agree with the stated intent. With that in mind, IMA believes this subsection can be simplified to state the intended purpose of the "monitoring data" as outlined in the rulemaking session on July 17th, 2020. We suggest simplifying the language to add clarity on what IDL is trying to accomplish in this section with the following:

070.06 Monitoring Data. *The Department shall, through consultation with DEQ, obtain the operator's baseline data on ground water or surface water gathered during the planning and permitting process for the operation.*

IDAPA 20.03.02.070.02a. Phased Approach.

The phased approach in section 069 of the rule does not appear to be and likely shouldn't be a requirement in the reclamation plan. The confusion applies to what is "required" in section 070. IMA suggests adding the words "or allowed" to subsection (a) so that it reads:

- a.** *All items and information required or allowed under section 069 of these rules;*

IDL Proposed: IDAPA 20.30.02.120.01.

While we understand and agree with the intent of the section to assure appropriate financial assurances are in place prior to mining activities, we believe that the section needs to be revised to reflect current industry practices. Mineral development and withdrawal is dependent on commodity prices and significant capital investment and outlay. It is clear throughout this rule and Idaho code that mining cannot begin at a proposed site unless appropriate financial assurances are in place. Regardless of timeline, a reclamation plan should still be valid even if financial assurances need updated prior to operation of the mine. The price of the commodity and the feasibility of the project does not change the proposed reclamation and remediation actions.

IDL Proposed: IDAPA 20.03.02.120.02.

IMA Suggests to removing the 90-day deadline for providing financial assurance. It is unclear what the goal of this provision is specifically since the operation of a facility cannot begin until financial assurances are in place. IMA suggests the following revision.

Prior to operation of a cyanidation facility after approval of a permanent closure plan, an operator will submit to the director on a Department approved form financial assurance meeting the requirements of Idaho Code § 47-1512(a)(2). The financial assurance will be in an amount and form equal to the total estimated costs under subsection 071.02, k, section 120 and section 121 of these rules.

IDL Proposed: IDAPA 20.03.02.120.15 Financial Assurance Release.

IMA suggests rewording the introduction to be consistent with Idaho Code § 47-1512(h) as follows:

Upon substantial completion of reclamation, post closure or permanent closure, or a portion thereof, the operator may notify the Director of operator's desire to secure release from financial assurance or a portion of financial assurance. When the director has verified the reclamation plan, post closure or permanent closure, or portion thereof, has been substantially completed the financial assurance amount will be released. Any action or inaction by the Director in this subsection is appealable to the Board. Any decision by the Board will be considered a final order under Idaho Code § 47-1514

Section 120.15, b Similarly, IMA suggest rewording this subsection as follows:

If the Director finds that a specific portion of reclamation, post closure or permanent closure has been substantially completed, the financial assurance shall be reduced to the amount required to complete the remaining reclamation, post closure and permanent closure.

IDL Proposed: IDAPA 20.03.02.122.05 Trusts.

IMA believes that the concept of a trust fund is clearly outlined in Idaho Code § 47-1512 and believes that language from the statute is the best clarifying language to be used in the rule. A trust fund that is set up in the manner outlined in the statute uses a third party trustee that will have a fiduciary duty to maximize the return to the trust and its beneficiary (the State of Idaho). An operator will have no influence on the investments that are made or what rate of return is other than its statutory requirement to true up the balance of the trust if it is not meeting expectations. In fact, the only influence the operator will have on the trust is in the phased or initial funding and the expected return that is outlined in Idaho Code § 47-1512. Further, none of these provisions are wholly in the control of the operator as they will all be identified and negotiated in a memorandum of agreement with the Board. In addition, IDL's position that individual equities should not be available to the trustee is in conflict with Idaho Code § 47-1512(l). The statute clearly outlines three types of investments that can be made, including equities, bonds and government securities. The range of investments will be spelled out in a memorandum of agreement between the operator and the board as specified in Idaho Code § 47-1512(l)(5). It is unclear where the limitation on investment bonds to "AAA" or "AA" came from. IMA believes bonds held by a trust can be rated less than "AAA" or "AA" as the rate of return on such bonds can be higher. Idaho Code § 47-1512(l)(4) directs the trustee to invest the principal and the income of the fund in accordance with "general investment practices". We believe that the trustee has a fiduciary duty to maximize the return to the trust in accordance with the MOA agreed upon by the parties and that it is inappropriate to limit the flexibility to invest based on arbitrary ratings that the department has dictated. Similarly, it is unclear whether or not money market funds are rated in the same method as bonds. Clearly, this type of decision should be left to the trustee and not IDL Rules. We suggest striking this subsection or at the very least replacing the bond ratings with the term "investment grade" to provide the trustee with the flexibility to invest appropriately.

IDL's proposal to limit trust funds to only post closure and to require full funding is contrary to the intent of HB 141. IMA has identified how a trust agreement should be funded consistent with HB 141 at prior meetings. When HB 141 was under review by the Idaho Legislature, IMA assured the Legislature that that the types and forms of financial assurance provided in Idaho Code § 47-1512 were based upon well-established financial mechanisms under existing federal and state laws, including IDEQ's hazardous waste rules. The concept of a trust fund in HB 141 was taken from these hazardous waste rules. See 40 CFR 264.143 and 145, IDAPA 58.01.05.008. A formula is specified in the hazardous waste rules for making periodic payments into a trust fund. The notion that solid and hazardous waste sites have a lower risk profile than a mine site is not an accurate portrayal of these sites or what they contain and in any event the Legislature determined that a payment schedule into a trust fund should be an option for a mining operation. See Idaho Code § 47-1512(l)(ii). It is not up to IDL to second guess the Legislature's determination on risk profiles or to preclude use of a payment schedule as the latest draft rule does. If an operator chooses to use a trust fund, a payment schedule should be authorized for reclamation, post

closure or permanent closure. Similarly, a payment schedule over the life of a mine, post closure and permanent closure should be allowed consistent with the payment schedule formula set forth in the above cited hazardous waste regulations. Or a different payment schedule negotiated in the MOA. IMA suggests the following revisions to section 121:

121.05.ii *When used to cover reclamation, post closure or permanent closure a payment schedule to provide financial assurance for such activities will be specified in the memorandum of agreement as specified in Idaho Code § 47-152(l)(ii).*

Section 122.05.a. Disbursements from the trust. We are not clear what is intended in this subsection. If the partial release of funds by the trust is due to substantial completion of portions of either a reclamation plan or post-closure, it should be governed by Idaho Code § 47-1512(h).

Section 122.05.c. Please clarify that this subsection only prohibits stocks in the operator's company or parent company. **We suggest the following language:** *c. Equities may not include direct investments in the operator's company or parent company.*

Section 122.05.e.i. Please clarify that this also applies to permanent closure cost not just reclamation costs. We suggest adding permanent closure costs after reclamation costs.

IDL Proposed: IDAPA 20.03.02.140.a Nonpoint Source Control.

IMA is concerned the specificity in this section is an overreach by IDL into the operator's obligation to comply with water quality standards required by other regulations. IMA requests this section be rewritten to conform with the definition of BMPs in Section .010.03 as follows.

a. Appropriate BMPs for nonpoint source controls shall be designed, constructed and maintained with respect to site-specific mining operations, reclamation or permanent closure activities. Operators shall utilize BMPs designed to prevent or reduce pollutants from entering waters of the state.

Thank you for the opportunity to comment on the subject draft Rule and we look forward to further negotiation of a proposed rule.

Kindest Regards,

A handwritten signature in blue ink, appearing to read "B. J. Davenport", is written over a light blue circular stamp.

Benjamin J. Davenport